PP

v.

JOACHIM SELVANATHAN & ORS

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CRIMINAL TRIAL NO: MT(1) 45-14-2006]
18 AUGUST 2009

CRIMINAL LAW: *Penal Code - Sections 302 & 34 - Murder read with common intention - Common intention, ingredients of*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Standard of proof - Prima facie case*

EVIDENCE: *Circumstantial evidence - Nature of - Tests for - Murder read with common intention - Whether evidence sufficient to establish guilt of accused - Whether must point to accused and no one else committing the offence*

EVIDENCE: *Identification evidence - Poor quality of - Dock identification of previously unknown accused person - Whether of little value - Whether positive identification of accused at identification parade would strengthen prosecution's case - Admissibility of identification evidence - Whether court ought to follow the Turnbull guidelines when assessing identification evidence - Evidence Act 1950, s. 9*

EVIDENCE: *Identification parade - Conduct of identification parade - Procedure and guidelines - Whether court ought to follow the Turnbull guidelines when assessing identification evidence*

The three accused persons were charged with murder under s. 302 read with s. 34 of the Penal Code. The prosecution's case rested almost entirely on circumstantial evidence. SP14, a friend of the deceased victim, was the sole eye-witness to the murder. SP14 testified that at the material time, five men approached and surrounded SP14 and the victim. They began attacking the victim with parangs. One of the five men then attacked SP14 and chased him as he was running away. SP14 identified the three accused persons at three separate identification parades held. The issues before the High Court concerned the sufficiency of the circumstantial evidence to establish the guilt of the three accused and the quality of SP14's identification evidence.

Held (discharging and acquitting the accused persons at the end of the prosecution's case):

(1) Section 34 is essentially a rule of evidence. In the instant case, to infer joint responsibility on the three accused persons for the criminal act, s. 34 had to be read together with s. 302 of the Penal Code. In order for s. 34 to apply, four ingredients must be present. They are: (i) a criminal act, (ii) a common intention between the parties, (iii) participation in the doing of the act, and (iv) the act was done in furtherance of the common intention. *Krishna Rao Gurumurthi v. PP* (foll). (paras 17 & 18)

(2) At the close of the prosecution's case, the court must consider whether the prosecution has made out a *prima facie* case against the accused. The court must undertake a positive evaluation of the credibility and reliability of all the evidence adduced. The court must undertake a maximum evaluation of the prosecution's evidence. *Balachandran v. PP* (foll); *PP v. Mohd Radzi bin Abu Bakar* (foll); *Mat v. PP* (refd). (paras 20-24)

(3) Where a witness identifies an accused person who is not known to him in court for the first time, his evidence is of little value unless there has been a previous ID parade identification. Dock identification of an accused for the first time at the trial is undesirable. It is good practice to hold an ID parade. If it turns out positive, it would strengthen the case for the prosecution. Evidence of an ID parade identification is admissible under s. 9 of the Evidence Act 1950. *Kanan v. State of Kerala* (refd); *Arumugam Muthusamy v. PP* (FC) (foll). (para 30)

(4) The procedure for the holding of an ID parade may be summarized as follows: (i) all persons in the ID parade should be of the same ethnic group and same station in life as the suspect; (ii) the ID parade must be held at the earliest opportunity and all available witnesses should attend the very first parade. Separate ID parades should be held where there are two or more suspects; (iii) the witnesses should not be allowed to see the suspect until everything is ready and they walk in to identify him. The witnesses should not be given any prior assistance in identifying the suspect; (iv) the suspect should be placed among a number of persons in a row of not less than nine or ten persons. The suspect should be invited to stand where he pleases in the row. He may change his position after

each witness has been called in. He should be asked if he has any objection to any of the persons present or to the mode of arrangement; (v) the witnesses should be brought in one by one. Each witness who has completed the ID parade process should be kept apart from the witnesses who have yet to come in; (vi) the officer in charge must ensure that the ID parade is properly and fairly conducted. He must record every circumstance connected with the identification, the names of the witnesses and their decisions fully, fairly and carefully. (para 30)

(5) In assessing the identification evidence as a whole, the court ought to follow the *Turnbull* guidelines. In the instant case, the identification evidence was weak and unreliable for the following reasons: (i) the incident happened at night; (ii) SP14 observed the assailants in the heat of the moment before he ran away; (iii) SP14 was in a state of shock; (iv) SP14 may have been in a state of intoxication; (v) the three accused persons were not known to SP14 previously; (vi) there was no light and it was dark at the *locus in quo*; (vii) no description of the accused person's appearances were given by SP14 to the police; (viii) there was no special reason for SP14 to remember the accused persons; and (ix) there was a time lapse of four years between the original sighting and the dock identification. (*Arumugam Muthusamy v. PP* (refd); *Ahmad Najib Aris v. PP* (FC) (refd). (paras 34 & 39)

(6) Where a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstantial evidence from which an inference of guilt is sought to be drawn must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. In the instant case, the court was not satisfied that the circumstantial evidence was cogently or firmly established so as to draw an inference of guilt. The evidence did not point irresistibly to the guilt of the accused. (para 40)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Asogan Ramesh Ramachandren v. PP [1998] 1 SLR 286 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(foll)***
Bashir v. State AIR [1953] All 668 ***(refd)***

Chan Chun Ling & Anor v. PP [1955] 1 LNS 8 HC ***(refd)***
Chan Sin v. PP [1949] 15 MLJ 106 ***(refd)***
Chandmal & Anor v. State of Rajastan AIR [1976] 917 ***(refd)***
Chang Kim Siong v. PP [1967] 1 LNS 18 FC ***(refd)***
Che Omar Mohd Akhir v. PP [1999] 2 CLJ 780 CA ***(refd)***
Chean Siong Guat v. PP [1969] 1 LNS 23 HC ***(refd)***
Chooi Kam Woh v. Regina [1954] 1 LNS 9 HC ***(refd)***
Kanan v. State of Kerala AIR [1979] SC 1127 ***(foll)***
Krishna Rao Gurumurthi v. PP And Another Appeal [2009] 2 CLJ 603 FC ***(foll)***
Lai Ah Kam & Anor v. Rex [1939] 1 LNS 45 HC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Low Thim Fatt v. PP [1988] 1 LNS 218 HC ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210 CA ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(refd)***
PP v. Kalaiselvan [2001] 1 LNS 24 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Logaraja Ratnam [2004] 8 CLJ 483 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(foll)***
PP v. Ong Phee Hoon James [2000] 3 SLR 293 ***(refd)***
PP v. Sainal Abidin Mading [1998] 3 CLJ 41 HC ***(refd)***
PP v. Toh Kee Huat [1964] 1 LNS 149 HC ***(refd)***
R v. Finley [1993] Crim LR 50 ***(refd)***
R v. Turnbull & Ors [1976] 3 All ER 549 ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Suresh v. State of Uttar Pradesh AIR [2001] SC 1344 ***(refd)***
Tan Buck Tee v. PP [1961] 1 LNS 130 HC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Thirumalai Kumar v. PP [1997] 3 SLR 434 ***(refd)***
William Tan Cheng Eng v. PP [1970] 1 LNS 168 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(1), (2), (3)
Evidence Act 1950, s. 9
Penal Code, ss. 34, 300(a), (b), (c), (d), 302

Other source(s) referred to:
Mallal's Criminal Code, 4th edn, p 155

For the prosecution - Jean Sharmila (Mohd Daud with her); DPPs
For the 1st accused - Norman Fernandez; M/s Norman Fernandez & Co
For the 2nd accused - Freda Sabapathy; M/s Freda & Co
For the 3rd accused - GK Sritharan; M/s GK Sritharan & Co

Reported by Andrew Christopher Simon

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] In this case the three (3) accused persons are charged with two others still at large with the murder of one Rajendran a/l Allakan which charge reads as follows:

> Bahawa kamu bersama-sama dua orang lagi yang masih bebas pada 15.8.2004, antara jam lebih kurang 8:30 malam dan 10:00 malam, di tepi Jalan Hang Jebat 12, Taman Skudai Baru, Skudai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, dengan memajukan niat bersama telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Rajendran a/l Allakan K/P No. 581224-08-5559 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

Prosecution Case

[2] Twenty-seven (27) witnesses were called by the prosecution to give evidence. The only eye-witness account of the incident is that of M. Vadivelu a/l Muthoo (SP14). SP14 is a close friend of the deceased. According to SP14 on 15 August 2004 at about 6pm he was having a drink with the deceased at a restaurant at Taman Tun Aminah. At about 8.30pm SP14 and the deceased were walking back to the deceased's home at Pangsapuri Jasa, Mutiara Rini, Johor Bahru. On the way they met an Indian man named Maniam at a food stall near the deceased's apartment. The deceased asked Maniam why he was still drinking samsu and had not gone home. Maniam replied with obscenities which infuriated the deceased who slapped Maniam on the face. Maniam fell down and SP14 helped to pick him up.

[3] Suddenly five (5) men appeared on the scene. Three (3) of the men came up from the front whilst two (2) others came from behind. SP14 said that he was able to see the faces of the three men; he did not see the faces of the two men who came from behind. SP14 identified the three men as the three accused persons (OKT1, OKT2 and OKT3) in the dock. One of the three men attacked and hacked SP14 with a parang. SP14 identified the man who attacked and hacked him as OKT3. SP14 said OKT3 hacked him with a parang on his face and chest. SP14 also saw the deceased being attacked and hacked with parang by OKT1 and OKT2. SP14 tried to help the deceased but the deceased shouted to SP14 to run away. As SP14 was running away he saw the

deceased being hacked by three men. OKT3 chased SP14 who was running to his work place. SP14 lost consciousness when he reached his work place.

[4] SP14 said that when he and the deceased were attacked Maniam had already fled the scene. After he regained consciousness in the morning SP14 went to the deceased's house and was told by the deceased's wife about his death. SP14 then lodged a police report (exh. P51) on the incident at the Skudai police station. SP14 also said that he attended three identification parades. On each of these identification parades he identified each one of the three accused persons.

[5] Dr. Shahidan bin Mohd. Noor (SP16) a forensic pathologist conducted a post-mortem on 16 August 2004 on the deceased named Rajendran a/l Allakan (KP: 581224-08-5559) at Hospital Sultanah Aminah, Johor Bahru at the request of the investigating officer ASP Satheesh Menon. ASP Satheesh Menon who was present during the post-mortem identified the deceased to him. SP16 recorded his findings and prepared a post-mortem report (exh. P53). On external examination SP16 found superficial incised wounds on the upper right back, incised wounds on the head, incised wounds on the face, incised wounds on the right arm and wrist, incised wounds on the right index and middle fingers and incised wound on the inner left shin. On internal examination SP16, *inter alia*, recorded as follows:

Head:

The scalp was injured or incised at sites described. The skull 5-10 mm thick being thicker on front and back and thinner on the sides showed fragmented depressed fracture with free bone fragment 9x5cm to the left of vertex and another cracked fracture on the right occipital bone near the parieto-occipital suture. The brain coverings were not breached. The brain (1,250g) was grossly intact save for foci of contusions on the left vertex area.

The nasal bone was severed and the maxilla severed between the upper incisors until the left zygomatic arch.

Mouth, throat and neck structures.

The tip of the tongue was incised 3 cm on the right while other structures and organs of these areas were intact and unremarkable when eviscerated and examined.

[6] SP16 concluded that there were multiple incised wounds on the deceased's body especially on the head. Internally blood was aspirated into the airways with some degree of brain injury. The cause of death was formulated as due aspiration of blood into the airways with head injury. In cross-examination SP16 testified that the combination of injury to the face and head was the most probable cause of death. There were several injuries to the body. The nature of the injuries suggest a sharp implement which when used with adequate force can cause such injuries. SP16 also said that the wounds inflicted were caused by an implement which can cut and from the wound profile, suggests that it was delivered with adequate force to cut the underlying soft tissue. The injuries could have been caused by the parangs (exhs. P10A and P11A). SP16 also agreed with the suggestion that based on the injuries sustained the deceased was under continuous attack and had died very soon after the attack.

[7] Sii Hie Hiong (SP13) testified that she saw her late husband Rajendran a/l Allakan on 15 August 2004 at about 5.30pm when she was on her way to work. Her late husband was then together with SP14. At about 1.30am the following day she received a call on her handphone informing of her husband's death. At about 8am SP13 went to the mortuary at Hospital Sultanah Aminah and saw her late husband's body. SP13 identified some of her late husband's personal effects which were found on him.

[8] ASP Satheesh Menon a/l Narayinan (SP27) testified that on 16 August 2004 he went to Jalan Hang Jebat 12 at about 12.30am together with a police party. When he arrived at the location he found a body of an Indian male along the side of Jalan Hang Jebat 12, Taman Skudai Baru, Skudai. He found a wallet covered in blood near to the body. Inside the wallet he found an identity card in the name of Rajendran a/l Allakan. SP27 then instructed Kpl Salleh to take photographs of the body and the crime scene. SP27 prepared a sketch plan (exh. P62) of the scene. At about 5am, SP27 and a police party went to flat 05-15, Blok P, Flat Pangsapuri Jasa, Taman Mutiara Rini. SP27 found an Indian man (identified as OKT1) inside the flat. Inside the flat SP27 found a parang next to a fridge in the kitchen. SP27 then arrested OKT1 and seized the parang (exh. P10A). SP27 also examined the surroundings of Blok P, Flat Pangsapuri Jasa and found a parang (exh. P11A) below Blok P which he seized. Later at 11am SP27 attended a post-mortem of the deceased together with Kpl Salleh. Kpl Salleh took some photographs of the deceased. SP27 subsequently received a copy of the post-mortem report (P53). Meanwhile on 17 August 2004 an Indian man named Murali (SP11) came to SP27's office and handed

over a gold chain necklace (exh. P22A) to SP27. On 20 August 2004 SP27 requested C/Inspector Muhammad Nazif bin Wahab (SP15) to conduct an identification parade ('ID parade'). On 22 October 2004 SP27 requested ASP Izuddin bin Abd Wahab (SP25) to conduct an ID parade. On 3 May 2004 SP27 requested ASP Idris bin Karim (SP18) to conduct an ID parade.

[9] Chief Inspector Muhammad Nazif bin Wahab (SP15) testified that on 20 August 2004 he conducted an ID parade for the identification of OKT1. There were 13 individuals including OKT1 in the line-up, SP14 identified OKT1. SP15 prepared a report of the ID parade (exh. P52). ASP Izuddin bin Abd Wahab (SP25) testified that on 22 October 2004 he conducted an ID parade for the identification of OKT2. Including OKT2 there were altogether 10 individuals in the line-up. At the ID parade SP14 identified OKT2. SP25 prepared an ID parade report (exh. P59). ASP Idris bin Karim (SP18) testified that on 3 May 2004 he conducted an ID parade for the identification of OKT3. There were 12 other individuals and OKT3 in the line-up. SP14 identified OKT3. SP18 also prepared an ID parade report (exh. P55).

[10] The chemist Baktiar bin Kassim (SP19) testified on the DNA analysis carried out on the exhibits submitted to him by SP27. SP19's evidence on the DNA profiling did not connect any of the accused persons to the parang (P10A and P11A), blood sample from the deceased (P15) or the blood found on the jeans (P12) or the T Shirt (P13).

[11] At the close of the prosecution case learned deputy submitted that the prosecution has proven the following four ingredients. Firstly, that there has been a death and that the deceased is Rajendran a/l Allakan. This fact is corroborated by the pathologist SP16, the investigating officer SP27, the wife SP13 and close friend SP14. Secondly, it has also been established through the evidence of SP16 that the deceased died as a result of the injuries which he sustained. Thirdly, the deceased sustained the injuries as a result of the act of all the accused persons. The evidence of SP14 who was present at the scene of the crime clearly shows that the deceased sustained injuries that caused his death as a result of the act of all the accused persons. SP14 was able to see the faces of the three men who came from the front as the three accused persons in the dock. SP14 identified OKT3 as the attacker who hacked him with a parang. SP14 also saw the deceased being hacked by OKT1 and OKT2 with a parang. SP14 attended 3 ID parades and on each occasion he identified each one of the three accused persons. In cross-examination SP14 testified that there was lighting and the

crime scene was not dark. SP14 also said that there was lighting at the food stall. SP14 did not agree with the suggestion that he could not identify the three men who came from the front because it was dark and there was only very little lighting. SP14 also said that it was OKT3 who attacked him and that he did not know OKT3's name. SP14 also said that all the participants at the ID parades were Indian men. He said that at the first ID parade, all the participants entered into the room together. None of the participants were handcuffed. Learned deputy submitted that there was sufficient lighting from the roadside and the car park surrounding the food stall where SP14 and the deceased were attacked. The lighting was good enough to enable SP14 to identify and register in his memory the faces of the three accused persons. The slash marks on SP14's face and chest as shown in the photograph (exhs. P50A, B & C) corroborates the fact that he was attacked from the front by OKT3 and this gave him the opportunity to look at the assailant's face. The identification by SP14 was credible. The Turnbull guidelines are just guidelines and each case depends on its own facts. The Turnbull guidelines does not amount to inflexible rules with no exceptions (*Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 CA). The answers given by SP14 in cross-examination were unwavering and firm. He stood by his evidence of the roles played by OKT1, OKT2 and OKT3 during the attack and his credibility was not shaken. Learned deputy also submitted that even if SP14's identification at the ID parades were rejected, the court might consider the dock identification made by SP14 of the three accused persons during the trial (*Ong Poh Cheng v. PP* [1998] 4 CLJ 1 CA). On the alleged discrepancies between SP14's evidence and his police report (P51) learned deputy submitted that it is normal for any man to have forgotten certain important details or what has been said in his report which was lodged four years before he testified. These discrepancies do not necessarily make SP14 an unreliable witness (*Mohamed Alias v. PP* [1981] 1 LNS 200; *Che Omar Mohd Akhir v. PP* [1999] 2 CLJ 780; *Chean Siong Guat v. PP* [1969] 1 LNS 23). SP14 is a credible witness and his evidence should be accepted even though there are some discrepancies.

[12] Fourthly, the prosecution relies on the paras. (a), (c) and (d) of s. 300 of the Penal Code in establishing the acts of the accused persons as murder. An intention to kill can be inferred by looking at the nature and number of injuries caused to the deceased person and the instrument used in inflicting these injuries which (*Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; *Tan Buck Tee v. PP* [1961] 1 LNS 130; *PP v. Sainal Abidin Mading* [1998] 3 CLJ 41). Applying

A illustration (a) above, learned deputy submitted that the intention to cause death of the deceased could be inferred from the injuries inflicted by OKT1, OKT2 and OKT3 on the head of the deceased. These injuries which resulted in internal blood being aspirated into the airways with some degree of brain injury was the cause of death. B The injuries were inflicted on the vital part of the body. The injuries on the vital parts of the deceased's body inflicted with parang (a deadly weapon) is clear evidence of the intention of the accused persons to cause the death of the deceased. As for para. (c) above, learned deputy submitted that the only question to be C considered is whether the three accused persons had the intention to inflict the fatal injuries on the deceased's head. If there was no intention on the part of the three accused persons then why did they deliberately aim their parang at the deceased's head. This shows a deliberate and calculated act to inflict injuries on the head. The accused persons knew that the injuries were sufficient in the D ordinary course of nature to cause death. Accordingly, para. (c) is also fulfilled. Learned deputy further submitted that in striking at the deceased's head with a parang the three accused persons must be taken to know that their acts to be so imminently dangerous to the life of the deceased that it must in all probability cause death, E (*William Tan Cheng Eng v. PP* [1970] 1 LNS 168).

[13] As to common intention, learned deputy submitted that it must be shown that the criminal act was done by any one of the accused persons and that it was done in concert pursuant to a pre- F arranged plan. Such a pre-concert or pre-arranged plan can be developed on the spot or during the commission of the offence (*Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344). Common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC). G Learned deputy submitted that on the facts, the act of the three accused persons in attacking the deceased and SP14 indicates that they had acted and participated in the commission of the crime with intent to murder the deceased. There is no other explanation why the three accused persons attacked and hacked the deceased so H viciously if they did not have the intention of causing death to the deceased. Their motive might not be clear but their common intention to kill the deceased is crystal clear as evident from the nature of the injuries on the deceased's face. On the evidence as a whole the prosecution has made out a *prima facie* case against I OKT1, OKT2 and OKT3 on the charge under s. 302 of the Penal Code.

Defence Submission

[14] Learned counsel for OKT1 submitted that there is no direct evidence to implicate OKT1 with the death of the deceased. The prosecution case is based on circumstantial evidence. Therefore the burden on the prosecution is a heavy one and the evidence must point irresistibly to the guilt of the accused; and if there are gaps then that will not be sufficient (*PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285). The prosecution's main evidence is that of SP14 which is inconsistent and unreliable. Under cross-examination SP14 contradicted himself when SP14 said that (i) three persons came up from the front and ran towards SP14 (ii) the men came and immediately attacked him, (iii) that happened in a manner of seconds, (iv) SP14 was afraid and ran away and then fainted, and (v) SP14 ran away to save himself. Learned counsel submitted that according to SP14's evidence SP14 and not the deceased was initially attacked by the three men. There is no evidence to say that the deceased was attacked first. This contradicts SP14's evidence in chief when he said that one of the three men hacked him on the face and chest and that he saw the deceased being attacked by three men. Learned counsel also submitted on the discrepancies between SP14's police report because there is no mention that two men came from behind. SP14 also changed his testimony when he agreed in cross-examination that he did not turn back and run away. However, in his evidence in chief SP14 said that he turned back whilst running away. Therefore based on what happened to SP14 it was impossible for SP14 to see what happened to the deceased. It is only SP14's supposition when he said that because the three men attacked him therefore they must have attacked the deceased. Learned counsel also submitted that the ID parade was not properly carried out by SP15 to the prejudice of OKT1. SP15 admitted that he never attended any course on ID parade and that his experience is based on his work experience. SP15 said on the date of the ID parade OKT1 was 28 years of age and that four of the line-up were below 21 years and one aged 38 years. The discrepancies in the age of the line-up have made it easier for the accused to be identified. Further the ID parade is defective as the ID parade report did not contain details of the 'taraf hidup' and the clothes worn by the men in the line-up. There is also no confirmation that (i) OKT1 was given the option of choosing where to stand in the line-up and (ii) OKT actually gave the answers to the questions typed out in the ID parade report. Learned counsel also submitted that OKT1 would have stood out in the ID parade line-up because he had been

A remanded for four days. OKT1's unshaven sideburns, tangled hair and general appearance would have made it easy for him to be identified. Therefore the identification evidence of OKT1 is inadmissible as it is prejudicial to OKT1. Learned counsel also alluded to the possibility that the deceased was hacked by the two B other men who are still at large. Lastly, it was contended that there is no evidence to link the parang (P10A) which was found in OKT1's house with the murder. Two important witnesses Vijaya a/p Permalu dan Maniam was not called by the prosecution. The investigating officer SP27 also agreed in cross-examination that the C scene of the crime was dark. Therefore it is impossible for SP14 to have seen what happened to the deceased. OKT1 should be acquitted and discharged.

[15] Learned counsel for OKT2 submitted that OKT2 was mistakenly identified by SP14; or that SP14 concocted or fabricated D his evidence to say that OKT2 was one of the five Indian men who murdered the deceased. On the night in question SP14 was drinking alcohol with the deceased. According to the investigating officer SP27, SP14 was drunk. SP14 contradicted himself when he said in cross-examination that he did not see the two men coming from E behind because he ran away. SP14 also said that he saw the deceased being hacked by three men although he testified earlier that only two men were involved. SP14 appears to be confused and unsure of what really happened and how it happened. As the lights at the food stall was switched off, visibility nearby must have been F poor. It was also contended that SP14 could not remember the colour scheme of the parang. Learned counsel also argued that SP14's evidence that he saw OKT3 coming towards him is a lie because in his evidence he saw three Indians coming towards him from the front and two from the back whilst in cross-examination he said all five came from the front. Further SP14 testified in cross- G examination that the first time he saw OKT2 was in the police station after OKT2 was arrested. Learned counsel also contended that SP14's police report (P51) was lodged after SP14 was informed that the deceased was killed. The omission to mention the involvement of the accused persons is significant. SP14 did not H explain why he omitted this important and material fact. As SP14's evidence in court is the only witness implicating the accused persons it was not safe to treat SP14 as a truthful witness (*Lee Ah Seng & Anor v. PP* [2007] 4 CLJ 1 FC). It was also submitted that the quality of identification of OKT2 does not satisfy the Turnbull I guidelines because: (i) SP14 only saw the assailants for a few seconds, (ii) the lapse of four years between the original observation

and the subsequent dock identification in court should not be accepted, (iii) SP14 saw the assailants whilst undergoing the trauma of been attacked and hacked, (iv) there were no special or distinct marks to remember the assailants by, (v) there was no lighting at the food stall and only lighting from the street light, (vi) SP14 had never seen OKT2 before and (vii) SP14 did not describe the assailants to the investigating officer. It was also contended that the identification of OKT2 by SP14 at the ID parade is of no weight because SP14 was shown a photograph of OKT2 before the ID parade. Further OKT2 had been in remand for two weeks prior to the ID parade; he had spotted a grown-beard and moustache and had long hair. He was light-skinned and much younger than the participants. The ID parade was not conducted fairly (*Low Thim Fatt v. PP* [1988] 1 LNS 218; *Chan Sin v. PP* [1949] 15 MLJ 106). There is also no supporting identification evidence available to connect OKT2 to the murder. The DNA evidence derived from the exhibits did not connect OKT2 to the murder. Further the fact that no DNA samples were taken from OKT2 has prejudiced OKT2. There is no evidence that the parang (P10A and P11A) were dusted for fingerprints (*PP v. Toh Kee Huat* [1964] 1 LNS 149; *Chang Kim Siong v. PP* [1967] 1 LNS 18; *Lai Ah Kam & Anor v. Rex* [1939] 1 LNS 45; *Chooi Kam Woh v. Regina* [1954] 1 LNS 9). Learned counsel further submitted that the prosecution's failure to call Maniam as a witness has occasioned a serious miscarriage of justice. Maniam was at the scene of the incident. He would have been able to shed light on who murdered the deceased. No sufficient efforts were made to trace him (*PP v. Kalaiselvan* [2001] 1 LNS 24). Finally, learned counsel contended that OKT2 has been misled and prejudiced by the prosecution's failure in its opening speech to properly outline the nature of the case and the evidence against OKT2. For the foregoing reasons the prosecution has failed to establish a *prima facie* case and OKT2 should be acquitted and discharged.

[16] Learned counsel for OKT3 submitted that there is no direct evidence that OKT3 attacked and murdered the deceased. Firstly, the evidence of SP14 is untruthful, unreliable and tainted with discrepancies. In cross-examination SP14 said that he and the deceased were drinking beer at about 5pm. SP14 could not remember what kind of beer he consumed. When the attack took place at the food stall it was dark. The food stall was already closed. The light to the food stall had been switched off. There was a little light from a car park. The car park was closed and there was no car park office. There is no evidence as to whether there were lights

A from a shop situated about 50 feet from the food stall. The only source of light is the little light from the car park about 100 feet away. The assailants came from the direction of the car park so that their faces must have been dark and not visible. SP27 confirmed that the food stall was closed. SP27 said that the nearest source of
B light would be a street lamp about one meter away. SP27 did not see any lights from the car park. SP27's evidence contradicts SP14 evidence on this issue. SP14 was the first person to be attacked; the attack happened within a few seconds and he immediately ran for his life. In that state of panic SP14 could not possibly see the face
C of OKT3. SP27 agreed that SP14 and the deceased were drunk when the attack took place. SP14 contradicted himself when he said that he had looked behind when he was running away. In cross-examination SP14 agreed that he was very frightened and that he did not look behind him when he was being chased but just kept
D on running to save his own life. This also contradicts SP14's evidence that when he ran for his life he saw the deceased being hacked by three men. SP14 description of the parang is also wrong; the parang was not white or shiny as alleged. If OKT3 had been chasing him, then it would not be possible for OKT3 to have hacked and killed the deceased (*PP v. Logaraja Ratnam* [2004] 8
E CLJ 483). There is no evidence that OKT3 had hacked the deceased before he chased SP14 from the food stall. There is no evidence that OKT3 ran back to attack the deceased. SP14's police report (P51) that the assailants appeared 10 minutes after the deceased had slapped Maniam contradicted his testimony that the
F assailants appeared suddenly when he helped Maniam get up after being slapped by the deceased. SP14 failed to disclose details of the second half of the events he testified to. It is the prosecution's duty to close the gaps that exist in P51. This omission is fatal to the prosecution (*Lee Ah Seng v. PP* [2007] 5 CLJ 1 FC).

G **The Law**

[17] In the present charge the prosecution has invoked s. 34 of the Penal Code in order to impose joint criminal liability on all the three accused persons. Section 34 reads:

H

> **34. Each of several persons liable for an act done by all, in like manner as if done by him alone.**
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in
I the same manner as if the act were done by him alone.

Section 34 is essentially a rule of evidence. To infer joint responsibility on the three accused persons for the criminal act s. 34 must be read together with s. 302 of the Penal Code. The law on s. 34 has been enunciated recently by the Federal Court in *Krishna Rao Gurumurthi v. PP And Another Appeal* [2009] 2 CLJ 603. At p. 626 Richard Malanjum CJSS said:

> It is settled law that s. 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each one of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.
>
> The essence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of the injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.
>
> For a charge premised on common intention to succeed it is essential for the Prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s. 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

[18] In order for s. 34 to apply four ingredients must be present. They are: (i) a criminal act, (ii) a common intention between the parties, (iii) participation in the doing of the act, and (iv) act done in furtherance of the common intention. Firstly, the criminal act includes all the acts done by the persons involved which cumulatively resulted in the commission of the criminal offence.

Secondly, the words 'common intention' in s. 34 must be read in the context of 'in furtherance of the common intention of all'. In this context it becomes clear that persons 'acting in concert may be liable for an act, which may not be exactly the same act jointly intended by them, but has been done in furtherance of their common intention' (see *Bashir v. State* AIR [1953] All 668 at [15] per Desai J). Before a common intention can be inferred it must be shown that the criminal act was done pursuant to a pre-arranged plan (*Chan Chun Ling & Anor v. PP* [1955] 1 LNS 8; *Muhamad Safarudin Baba & Anor v. PP* [2002] 4 CLJ 210; *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043). This requirement of a pre-arranged plan, however, is not absolute. Common intention can be formed moments prior to the commission of the offence so long as the evidence shows that the parties acted in concert (*Asogan Ramesh s/o Ramachandren v. PP* [1998] 1 SLR 286). Common intention being essentially a state of mind it is practically impossible to prove a pre-arranged plan between the parties. Accordingly, inferences have to be drawn from the acts of the parties and the surrounding circumstances of the case. Thirdly, the ingredient of participation does not necessarily require presence at the scene of the crime in every case. In this modern technological era assistance in committing an offence can be given without physical presence at the scene. Whether the accused had participated to a sufficient degree so as to be deemed as culpable as the principal offender is an incident of fact (*Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466 CA). Lastly, there are three categories of acts which are considered to be done in furtherance of the common intention. According to *Ratanlal and Dhirajlal's Law of Crimes,* 25th edn, 2003 these acts are described as follows:

> ... firstly, the act which is directly intended in between all the confederates; secondly, the act which the circumstances of the case leave no doubt to conclude that though the act was not directly intended in between them but was taken by all of them as included in the common intention, and thirdly the act which any of the confederates commits in order to avoid or remove any obstruction or resistance put in the way of the proper execution of the common intention. In doing the third type of the act the individual doer may cause a result not intended by any other of the confederates.

[19] In a charge for murder under s. 302 of the Penal Code, the onus lies upon the prosecution to prove the following ingredients of the offence *viz*:

(i) the death of the deceased;

(ii) the deceased's death was caused by injury or injuries inflicted on the deceased;

(iii) the accused persons had caused the injury or injuries which resulted in the deceased's death;

(iv) the act which caused the death was committed with the *mens rea* (see s. 300(a), (b), (c) or (d) of the Code) if:

(a) the act is done with the intention of causing death; or

(b) the act is done with the intention of causing such bodily injury as the accused knows to be likely to cause the death of the deceased; or

(c) it is done with the intention of bodily injury to the deceased and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the accused knew that it was so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commit such act without any excuse for incurring the risk of causing death or such injury.

Burden And Standard Of Proof At Close Of Prosecution's Case

[20] At the close of the prosecution's case, it is the duty of the court to consider whether the prosecution has made out a *prima facie* case against the accused. In this respect, s. 180 of the Criminal Procedure Code ('CPC') provides as follows:

Section 180

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that a *prima facie* case has not been made out against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[21] What is the standard of proof on the prosecution at the close of its case? Subsection (1) makes it clear that the standard of proof is on the prosecution to make out a *prima facie* case. Subsection (2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out. On the other hand, if a *prima facie* case has been made out subsection (3) provides that the accused shall be called upon to enter his defence. Thus, whether or not the accused is acquitted or called upon to enter on his defence at the close of the prosecution case turns on the meaning of the phrase '*prima facie* case'.

[22] In *Balachandran v. PP* [2005] 1 CLJ 85 the Federal Court when called upon to consider the standard of proof on the prosecution at the close of the case for the prosecution has this to say at p. 99:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whitley's Law Dictionary*, 11th edn as:
>
> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

And continuing at p. 100,

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no *prima facie* case.

[23] In order to determine whether the elements of the offence have been established, the court must undertake a positive evaluation of the credibility and reliability of all the evidence adduced. In this regard the court must undertake a maximum evaluation of the prosecution evidence. In *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457 the Federal Court has this to say at p 465:

> After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended section is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter on his or her defence. *It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.* See, *Tai Chai Keh v. PP* [1948-49] MLJ Supp 105; *PP v. Kassim b Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case, one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato Mokhtar b Hashim & Anor v. PP* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted. (emphasis added)

[24] In short this court should take the following steps at the close of the prosecution's case:

1. Subject the prosecution evidence in its totality to maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable

A inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

2. Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;

3. After the defence is called, the accused elects to remain silent, then convict;

4. After the defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 263.

Findings Of The Court At The Close Of The Prosecution Case

[25] On the evidence as presented thus far the court finds that (1) there has been a death and that the deceased is Rajendran a/l Allakan; (2) the deceased died as a result of the injuries he sustained; and (3) the intention to cause the death of the deceased could be inferred from the injuries inflicted on the deceased. Did the deceased sustain the injuries as a result of the act of all the accused persons? This depends on whether there is any evidence implicating them to the crime.

[26] In this connection it is important to examine whether the parang exhs. P10A and P11A connect the accused persons to the crime. P10A was seized in flat unit no. 05-15 Blok P, Flat Pangsapuri Jasa, Taman Mutiara Rini where OKT1 was found and subsequently arrested. P11A was found below Block P, a public place. Anyone could have put it there. SP14 said that the parang used in the assault looked like those in the photographs of P10A and P11A (P6A & B). When asked about the parang in cross-examination SP14 said "Warna parang tidak ingat" but later said "parang berwarna putih – bahagian hadapan parang putih dan berkilat." The forensic pathologist SP16 said that the injuries on the deceased could have been caused by P10A and P11A. The chemist (SP19) examined and analysed the traces of blood on P10A and P11A. SP16 was unable to obtain any DNA profile from the traces of blood on P10A and P11A. No finger prints were lifted from P10A and P11A. In the circumstances the parang P10A and

P11A does not unequivocally connect the accused persons with the crime. There exists only a possibility that P10A and or P11A could have been used in the attack on the deceased.

[27] In this connection it is also necessary to consider the DNA evidence of (i) a cotton swab (P9) taken at the scene of the crime; (ii) a pair of jeans (P12) and a T-shirt (P13) seized from flat unit 05-15; (iii) 2 tubes of blood swabs (P14) taken from Block P; and (iv) a sample blood (P15) of the deceased. According to the DNA profiling the blood stains on the pair of jeans P12 did not belong to the deceased. No DNA profile was obtained from the T-shirt P13. The DNA profile of the blood swabs (P14) also showed that the bloodstains do not match that of the deceased.

[28] Learned deputy also applied to introduce a statement under s. 112 of the Criminal Procedure Code recorded from Vijaya a/p Perumal. Efforts to trace Vijaya were made by SP22, SP23 and SP24. SP22 took over as investigating officer from SP27. SP22 checked at the National Registration Department for Vijaya's last known address. SP22 said that he instructed SP23 to check the last known address but Vijaya was not there. SP22 then placed notices in Chinese, Malay and Tamil vernacular newspapers for Vijaya on 4 January 2009 but there was no response. SP22 admitted in cross-examination that SP23 went to Vijaya's last known address but she was not there. Vijaya's brother who was residing there said that he was not in touch with Vijaya because of family problems. He also said that Vijaya had gone back to Perak. SP24 went to the last known address to serve a subpoena on Vijaya. SP24 met Vijaya's brother who told him that Vijaya had left four years ago. He told SP24 that Vijaya had moved to Perak and that he did not have Vijaya's contact number or new address. SP22 agreed in cross-examination that the efforts to trace Vijaya "bukan terbaik dan sempurna". The general rule of evidence is that the best evidence must be adduced. By way of exception under proviso (c) of s. 32 of the Evidence Act 1950 statements which are relevant facts made by a person whose attendance cannot be procured without an amount of delay or expense which appears unreasonable may be admitted. The burden is on the prosecution to satisfy the said condition. In this case the efforts taken to trace Vijaya were not pursued vigorously and thoroughly. No attempts were made to check with the immigration department to determine if Vijaya had left the country. SP22 did not produce any copies of the notices that was purportedly advertised in the vernacular press. Mere ignorance of the whereabouts of Vijaya is not sufficient. The court

A is not satisfied that Vijaya's attendance cannot be reasonably procured without an amount of delay or expense. Even if this statement is admitted, it must be scrutinised as to its veracity. In the first place, Vijaya's date of birth is inconsistent with the identity card number written on the statement. Juraimah bt Ismail (SP26)
B Cif Inspektor agreed with defence counsel's suggestion that the last four digits of the identity card number '5345' belongs to a male person because it is an odd number. SP26 explained that she did not see the identity card; SP27 inserted the identity card number by his handwriting on the statement. There is doubt as to whether the
C statement was actually recorded from Vijaya a/p Perumal or some other person. Secondly, SP26 admitted that the word "Orang itu" in Ceraian (ii) is wrong and the correct word is "Kamu". If so, then it begs the question of whether the caution was properly administered prior to the recording. Taken in its totality the
D statement is unreliable; it is also prejudicial to the accused persons since they cannot cross-examine Vijaya on it.

[29] In the circumstances the only evidence connecting the three accused persons with the crime is the identification evidence of SP14. There is no other forensic or supporting evidence to connect
E the accused persons with the crime. The defence contends that the identifications are mistaken and not in compliance with the Turnbull guidelines. SP14 identified the accused persons at 3 ID parades held on 20 August 2004, 22 October 2004 and 3 May 2005. On 22 August 2008 SP14 identified the three accused persons in
F court. The question to be determined is whether in totality the identification evidence of SP14 is reliable.

[30] It is a settled principle of law that where a witness identifies an accused person who is not known to him in court for the first time, his evidence is of little value unless there has been a previous
G ID parade identification (*Kanan v. State of Kerala* AIR [1979] SC 1127). In *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 the Federal Court held that (i) dock identification of an accused for the first time at the trial is undesirable; and (ii) it would be good practice to hold an ID parade, which if it turns out positive, would tend to
H strengthen the case for the prosecution. Evidence of an ID parade identification is admissible under s. 9 of the Evidence Act 1950. There is no written law on the procedure for ID parade. However, the procedure has been neatly encapsulated in *Mallal's Criminal Code* (4th edn) at p 155. The practice of holding a proper ID parade may
I be summarised as follows:

(1) All persons on the ID parade should be of the same ethnic group and same station in life as the suspect. The disparity of ages between them should not be large. The persons in the line-up need not be of exactly the same description.

(2) The ID parade must be held at the earliest opportunity and all available witnesses should be required to attend at the very first parade. Separate ID parades must be held where there are two or more suspects.

(3) The witnesses must not be allowed to see the suspect until the moment when everything is ready and they walk in to identify him. The witnesses should not be not given any prior assistance by photographs or by any verbal or written description.

(4) The suspect should be placed among a number of persons in a row – not less than 9 or 10. The suspect should be invited to stand where he pleases in the row. He may change his position after each witness has been called in. He should be asked if he has any objection to any of the persons present or to the mode of arrangement.

(5) The witnesses should be brought in one by one. Each witness who has completed the ID parade process should be kept apart from the witnesses who are yet to come.

(6) The officer in charge must ensure that the ID parade is properly and fairly conducted. He must record every circumstance connected with the identification, the names of the witnesses and their decisions as fully and fairly and carefully.

SP14's ID Parade Identification Evidence

[31] The first ID parade was conducted on 20 August 2004 by SP15. The line-up consisted of OKT1 and 12 other Indian men. Their ages varied between 18 to 30 years. OKT1 chose his position in the line-up. SP15 also said that SP14 entered after the line-up was ready. SP14 walked past the line-up and identified OKT1 by touching on OKT1's shoulder. SP15 prepared a report of the ID parade (P52). In cross-examination SP15 said that four of the persons were below the age of 21 years. One was 38 years old. SP15 denied that OKT1 was dressed in remand uniform at the ID parade. SP15 said that he informed OKT1 of his right to object but OKT1 did not object to any of the persons present. OKT1 was 27 years old at the material time. According to P52 the disparity of ages of

A the 12 other persons present in the line-up are as follows: 18 years (two persons), 19 years (two persons), 21 years, 22 years, 24 years, 28 years, 30 years, 31 years, 32 years and 38 years. In cross-examination SP14 agreed that after he failed make any identification at the first ID parade, he went to see three police officers by the
B name of Alex, Menon and Raja. The said police officers were in the ID parade room. In re-examination SP14 said that they told him to identify only OKT3 which he then did. SP27 agreed that before the ID parade is conducted the persons would be lined-up in the detectives' room while SP14 was waiting in the holding room. SP27
C agreed that it is possible for SP14 in the holding room to see what is happening outside when the accused persons are brought to the detectives' room.

[32] The second ID parade was held on 22 October 2004. SP25 who conducted it said OKT2 and nine other Indian men were
D included in the line-up. OKT1 was informed of his right to choose his position in the line-up. OKT2 did not object to any of the other persons present. SP14 identified OKT2 when he touched OKT2 on the shoulder. SP25 prepared a ID parade report (P59). In cross-examination SP25 said that OKT2 was quite tall, looked thin,
E had short hair and moustache and some sideburn. However, SP25 could not remember if OKT2 had a full grown beard and long hair even though OKT2 was in remand for 15 days. SP15 was not sure if the photographs of the suspects were displayed in the room where the ID parade was held. SP25 also said that he could not remember
F whether he told OKT2 that he had a right to object to the other persons present. Since OKT2 did not say anything SP25 assumed that OKT2 was satisfied with the manner the ID parade was conducted. SP25 could not remember if OKT2 was wearing remand uniform at the ID parade. SP25 agreed that OKT2 is light-skinned
G for an Indian. SP25 could not remember if the nine persons present were light-skinned or dark-skinned. At the time of the ID parade OKT2 was 22 years of age. According to P59 of the disparity of ages of the nine other persons present in the line-up are as follows: 20 years, 26 years, 27 years, 32 years, 35 years, 39 years (two persons), 40 years and 54 years. Prior to the ID parade SP25 had
H shown SP14 a photograph of OKT2. The third ID parade was conducted by SP18 on 3 May 2005. SP18 testified that OKT3 and 12 other Indian men were in the line-up. He informed OKT3 of his right to object to the persons present. OKT3 did not make any objections. SP18 also asked OKT3 to select his position in the line-
I up. OKT3 was identified by SP14 when he touched OKT3's

shoulder. SP18 also said that he ensured that the persons present were within the same age group and physical build as OKT3. SP18 prepared a report of the ID parade (P55). Under cross-examination SP18 said that he could not remember if OKT3 was wearing remand uniform at the ID parade. SP18 was not sure if OKT3 had long hair or thick moustache. SP18 could not remember if the other persons present had long hair or thick beard. As at the date of the ID parade OKT3 was 28 years old. According to P55 the disparity of ages of the 12 other persons present in the line-up are as follows: 22 years, 23 years, 24 years, 26 years (two persons), 27 years (three persons), 29 years, 30 years (two persons) and 38 years.

[33] At the first ID parade there was a disparity of age between the persons in the line-up. Allowing for a disparity of say five (5) years, five of the persons were much younger and one much older. This leaves only six persons remaining. At the second ID parade the age disparity between the persons was even larger. Of the nine persons in the line-up six can be discounted for being much older than OKT2. In addition, there is doubt as to (i) whether OKT2 was informed of his right to object to any of the persons present and (ii) whether OKT2 wore remand uniform at the ID parade. It is possible that SP14 may have been shown a photograph of OKT2 prior to the second ID parade. At the third ID parade there is doubt as to whether OKT3 wore remand uniform. In principle a breach of the procedural requirement in holding an ID parade does not necessarily make the identification evidence inadmissible. The deficiencies may affect the weight to be attached to such evidence (*Thirumalai Kumar v. PP* [1997] 3 SLR 434, 441; *PP v. Ong Phee Hoon James* [2000] 3 SLR 293, 306). However, where there is evidence of bad faith or a deliberate flouting of procedural requirements rather than mere inefficiency, the identification will probably not be upheld (*R v. Finley* [1993] Crim LR 50). In the circumstances described above whilst there is no evidence of any bad faith or deliberate flouting or procedural requirements, there were significant age disparities and some deficiencies. Applying the aforesaid principles to the aforesaid facts the court is of the view that the ID identification evidence is admissible but not much weight can be attached to it.

Evaluation Of SP14's Identification Evidence As A Whole

[34] The primary issue is to be considered is the identity of the three accused persons which the defence alleges to be mistaken. In assessing the identification evidence as a whole the court will be following the Turnbull guidelines (*Arumugam Muthusamy v. PP*

A [1998] 3 CLJ 597; *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 FC). The Turnbull guidelines were laid down by the Court of Appeal in *R v. Turnbull & Ors* [1976] 3 All ER 549 to assist the trial court in the evaluation of the identification evidence. The guidelines may be summarised as follows:

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(a) Caution must be exercised when the evidence turns on the evidence of visual identification; bearing in mind that a mistaken witness can be a convincing one.

(b) The circumstances in which the identification by the witness
C were made must be carefully examined. Factors which affect the quality of the identification evidence include: how long the witness observed the accused; how often?; under what light?; at what distance?; was there any impediment in the way?; was the accused known to the witness previously?; any special reasons
D for witness to remember the accused?; any material discrepancies between description given to the police and the accused's actual appearance?; time elapse between original sighting and subsequent ID parade identification.

(c) Where the quality of the identification evidence is poor the
E court should acquit unless there is other evidence in support of the correctness of the identification.

(d) The evidence which is capable of supporting the identification evidence should be specified.

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[35] On the night in question SP14 was drinking beer with the deceased from 6pm or earlier. On the way back to the deceased's house they stopped at a food stall at about 8.30pm. There the deceased met Maniam. The deceased admonished Maniam which led to an altercation between the deceased and Maniam. During the
G altercation five assailants suddenly appeared; three from the front and two from behind. SP14 said that he saw the faces of the three assailants who came from the front. SP14 identified the three accused persons as the three assailants. SP14 testified that OKT3 hacked at him with a parang whilst OKT1 and OKT2 hacked at
H the deceased with a parang. SP14 did not see the two other assailants who came from behind. SP14 ran for his life pursued by OKT3.

[36] In cross-examination SP14 said that he was drinking beer with
I the deceased at about 5pm. At that time the food stall was closed and the lights at the food stall were not switched on. To the right of the food stall is a shop about 50 feet away. Nearby the food stall

about 15 feet away is a road and a car park about 100 feet away. There was some lighting at the car park. SP14 said that the food stall was bright. The three assailants came from the direction of the car park. In re-examination SP14 said that at the time of the incident there was light at the car park and the road and the food stall was bright. SP14's made a police report (P51) on the incident about 16 hours after the incident. P51 does not contain any reference to the two men who came up from behind or to the attack on the deceased.

[37] The investigating officer SP27 testified in cross-examination that he did not see any car park with lighting near the food stall. SP27 agreed that according to the food stall and the structure it is impossible for the street light to be about 15 feet away and that it must have been more than that. SP27 also said that the deceased, SP14 and Maniam were drunk; the food stall was a very dark place and the only light is the street light. SP27 also admitted that he may have shown SP14 a photograph (ID16) of OKT2 on 17 August 2004.

[38] SP14 did not give any description of the three assailants to SP27. SP14's police report on the incident (P51) was made the day following the incident. By that time SP14 had already known that the deceased had been killed. However, he did not say anything about the attack on the deceased by the three assailants. In effect, P51 only corroborates SP14's evidence that he was attacked and hacked with parang. P51 does not corroborate SP14's evidence on the three accused persons attacking and hacking the deceased. SP14 did not give any reason for this material omission. The dock identification of the three accused persons by SP14 on 22 August 2008 comes four years after the incident on the night of 15 August 2004. The time elapse of four years between the original observation and the subsequent dock identification is significant. In addition the three accused persons are not known to SP14. SP14 did not give any reasons to say why or how he remembered the three accused persons. SP14 observation of the assailants must have been made in the heat of the moment.

[39] In short the circumstances surrounding the identification by SP14 are as follows: (i) the incident happened at night; (ii) SP14 observed the assailants in the heat of the moment before he ran away; (iii) SP14 was in a state of shock; (iv) SP14 may have been in a state of intoxication; (v) the three accused persons are not known to SP14 previously; (vi) there was no light at the food stall and it was dark; (vii) no description of the accused person's

A appearances were given by SP14 to the police; (viii) there is no special reason for SP14 to remember the accused persons; and (ix) the time elapse of four years between the original sighting and the dock identification. For the foregoing reasons the court finds that SP14's identification evidence is weak and unreliable.

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[40] In the premises the only evidence which links the accused persons with the commission of the offence are the circumstantial evidence described above. Where a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstantial evidence from which an inference of guilt is C sought to be drawn must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the D crime was committed by the accused and none else, ie, to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt (*Chandmal & Anor v. State of Rajastan* AIR [1976] 917 SC): In this case the court is not satisfied that the circumstantial evidence is cogently or firmly E established so as to draw an inference of guilt. They do not point irresistibly to the guilt of the accused. In the circumstances if the accused persons are called upon to make their defence and they elect to remain silent the court is not prepared to convict them on the evidence before the court. Accordingly, the court finds that no F *prima facie* case has been made out and the three accused persons are hereby discharged and acquitted.

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